

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SHYRIAA HENDERSON, on behalf of  
herself, and all others similarly situated,

Plaintiff,

v.

UNITED STUDENT AID FUNDS, INC.,  
D/B/A/ USA FUNDS,

Defendant.

Case No. 13cv1845-JLS (BLM)

**ORDER GRANTING PLAINTIFF'S  
MOTION TO COMPEL DEFENDANT'S  
DISCOVERY RESPONSES**

[ECF No. 91]

Currently before the Court is Plaintiff Shyriaa Henderson's June 5, 2015 motion to compel further discovery responses [ECF No. 91 ("MTC")], Defendant United Student Aid Funds, Inc.'s ("USA Funds") June 19, 2015 opposition [ECF No. 92 ("Oppo.")], and Plaintiff's June 26, 2015 reply [ECF No. 100 ("Reply")]. Having considered all of the briefing and supporting documents presented, and for the reasons set forth below, Plaintiff's motion to compel further discovery responses is **GRANTED**.

**FACTUAL AND PROCEDURAL BACKGROUND**

On August 8, 2013, Plaintiff filed a class action complaint alleging that USA Funds violated the Telephone Consumer Protection Act, 47 U.S.C. §§ 227 *et seq.* ("TCPA") by contacting Plaintiff's cellular telephone and invading Plaintiff's privacy. See ECF No. 1. On October 2, 2014, Plaintiff filed a First Amended Complaint ("FAC"), naming three new Defendants: GC Services Limited Partnership ("GC Services"), National Enterprise Systems, Inc. ("NES"), and Navient Solutions, Inc. ("Navient") (collectively "the newly added Defendants"). See ECF No. 47. Plaintiff's FAC alleges that beginning in 2010 and

1 continuing through June 2013, Plaintiff received unsolicited phone calls made on behalf of  
2 USA Funds to her wireless phone attempting to collect a debt. Id. at 5. Plaintiff claims that  
3 she did not provide USA Funds or its agents with prior express consent to contact her  
4 cellular telephone, and that they obtained her cellphone number from a third party by  
5 “trapping” such number. Id. at 7-8. Plaintiff further asserts that the phone calls were  
6 placed to her cellular telephone “via an ‘automatic telephone dialing system,’ . . . and by  
7 using ‘an artificial or prerecorded voice’ system . . . , which had the capacity to produce or  
8 store numbers randomly or sequentially, and to dial such numbers, to place telephone calls  
9 to Plaintiff’s cellular telephone.” Id. at 7.

10 Plaintiff further asserts in her FAC that USA Funds “acting as the guarantor/creditor  
11 of Plaintiff’s student loans,” hired Sallie Mae<sup>1</sup> to service and collect on Plaintiff’s defaulted  
12 student loans. Id. at 6. Plaintiff claims that although USA Funds did not make collection  
13 calls to Plaintiff, USA Funds and/or Sallie Mae hired several collection agencies, including  
14 GC Services, NES, Pioneer Credit Recovery, General Revenue Corporation, and NCO Group,  
15 to collect on Plaintiff’s loans by calling Plaintiff’s cellular phone “on behalf of Defendant USA  
16 Funds.” Id.; see also id. at 8-9. Plaintiff contends that USA Funds can be held vicariously  
17 liable for the unlawful calls made by third parties, such as Navient and collection agencies  
18 hired by Navient, if the third party had actual or apparent authority to make the unsolicited  
19 calls on behalf of USA Funds or if USA Funds ratified the third parties’ conduct. See id. at  
20 6-7.

21 Plaintiff seeks to represent the following proposed class:

22 all persons within the United States who received any unsolicited telephone  
23 calls from Defendants or Defendants’ agents on their paging service, cellular  
24 phone service, mobile radio service, radio common carrier service, or other  
25 service for which they were charged for the call, through the use of any  
26 automatic telephone dialing system or artificial or pre-recorded voice system  
as set forth in 47 U.S.C. § 227(b)(1)(A)(3) or artificial or prerecorded voice,  
which telephone calls by Defendants or Defendants’ agents were not made  
for emergency purposes or with the recipients’ prior express consent within  
four years prior to the filing of this Complaint.

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27 <sup>1</sup> In April 2014, Sallie Mae split into two entities: Sallie Mae and Navient, and Navient is the new entity  
28 that services federal student loans on behalf of USA Funds. Id.

1 Id. at 8.

2 On October 6, 2014, Plaintiff served interrogatories and requests for production on  
3 the newly added Defendants. MTC at 8. On October 24 and 27, 2014, the newly added  
4 Defendants filed motions to dismiss for lack of subject matter jurisdiction, and their motions  
5 were granted on April 8, 2015. See ECF Nos. 55, 56, 60, 81. On April 20, 2015, Plaintiff  
6 served a Second Set of Interrogatories and Requests for Production of Documents on the  
7 remaining defendant, USA Funds, and issued six subpoenas to the following nonparties  
8 hired by USA Funds to collect on Plaintiff's loan: GC Services, General Revenue Corporation,  
9 NES, Navient, NCO Group, Inc., and Pioneer Credit Recovery, Inc. ECF No. 91-1,  
10 Declaration of Alexis M. Wood ("Wood Decl.") at 3.

### 11 **LEGAL STANDARD**

12 The Federal Rules of Civil Procedure generally allow for broad discovery, authorizing  
13 parties to obtain discovery regarding "any nonprivileged matter that is relevant to any  
14 party's claim or defense." Fed. R. Civ. P. 26(b)(1). Also, "[f]or good cause, the court may  
15 order discovery of any matter relevant to the subject matter involved in the action." Id.  
16 Relevant information for discovery purposes includes any information "reasonably calculated  
17 to lead to the discovery of admissible evidence," and need not be admissible at trial to be  
18 discoverable. Id. There is no requirement that the information sought directly relate to a  
19 particular issue in the case. Rather, relevance encompasses "any matter that bears on, or  
20 that reasonably could lead to other matter that could bear on, any issue that is or may be  
21 [presented] in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).  
22 District courts have broad discretion to determine relevancy for discovery purposes. See  
23 Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002). Similarly, district courts have broad  
24 discretion to limit discovery where the discovery sought is "unreasonably cumulative or  
25 duplicative, or can be obtained from some other source that is more convenient, less  
26 burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C). Limits should be imposed  
27 where the burden or expense of the proposed discovery outweighs the likely benefits. Id.

28 A party may serve interrogatories that relate to any matter within the scope of

1 Rule 26(b). Fed. R. Civ. P. 33(a). "The grounds for objecting to an interrogatory must be  
 2 stated with specificity," and any interrogatory not objected to must be answered fully in  
 3 writing under oath. Fed. R. Civ. P. 33(b). Similarly, a party may request the production of  
 4 any designated documents or electronically stored information within the scope of  
 5 Rule 26(b). Fed. R. Civ. P. 34(a). "For each item or category, the response must either  
 6 state that inspection and related activities will be permitted as requested or state an  
 7 objection to the request, including the reasons." Fed. R. Civ. P. 34(b)(2)(B). The  
 8 responding party is responsible for all items in "the responding party's possession, custody,  
 9 or control." Fed. R. Civ. P. 34(a)(1). However, actual possession, custody or control are  
 10 not required; rather "[a] party may be ordered to produce a document in the possession  
 11 of a non-party entity if that party has a legal right to obtain the document or has control  
 12 over the entity who is in possession of the document." Soto v. City of Concord, 162 F.R.D.  
 13 603, 619 (N.D. Cal. 1995).

14 The party seeking to compel discovery has the burden of establishing that its request  
 15 satisfies the relevancy requirements of Rule 26(b)(1). Id. at 610. Thereafter, the party  
 16 opposing discovery has the burden of showing that the discovery should be prohibited, and  
 17 the burden of clarifying, explaining, and supporting its objections. DIRECTV, Inc. v. Trone,  
 18 209 F.R.D. 455, 458 (C.D. Cal. 2002) (citing Blankenship v. Hearst Corp., 519 F.2d 418, 429  
 19 (9th Cir. 1975)).

20 The Ninth Circuit has explained that "[d]istrict courts have broad discretion to control  
 21 the class certification process, and '[w]hether or not discovery will be permitted . . . lies  
 22 within the sound discretion of the trial court.'" Vinole v. Countrywide Home Loans, Inc.,  
 23 571 F.3d 935, 942 (9th Cir. 2009) (quoting Kamm v. Cal. City Dev. Co., 509 F.2d 205, 209  
 24 (9th Cir. 1975)). "The plaintiff in a class action 'bears the burden of . . . showing that . . .  
 25 discovery is likely to produce substantiation of the class allegations.' . . . Once this showing  
 26 is made, it is an abuse of discretion to deny precertification discovery." Perez v. Safelite  
 27 Grp. Inc., 553 F. App'x 667, 668-69 (9th Cir. 2014), *as amended on denial of reh'g and*  
 28 *reh'g en banc* (Mar. 7, 2014) (citing Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir.

1985) and Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1313 (9th Cir. 1977)).

Discovery in a putative class action at the pre-certification stage is generally limited to such certification issues as the number of class members, the existence of common questions, typicality of claims, and the representative's ability to represent the class. See Gusman v. Comcast Corp., 298 F.R.D. 592, 595 (S.D. Cal. 2014) (citation omitted); see also Del Campo v. Kennedy, 236 F.R.D. 454, 459 (N.D. Cal. 2006) ("Prior to certification of a class action, discovery is generally limited and in the discretion of the court."); Oppenheimer Fund, Inc., 437 U.S. at 351 n.13 ("[D]iscovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation." ). "Although discovery on the merits is usually deferred until it is certain that the case will proceed as a class action, the merits/certification distinction is not always clear," because the facts that are relevant to the class determination frequently overlap with the facts that are relevant to the merits of the case. Gusman, 298 F.R.D. at 595 (citing Wal-Mart Stores Inc. v. Dukes, — U.S. —, 131 S.Ct. 2541, 2551-52 (2011) (explaining that often the "rigorous analysis" under Federal Rule of Civil Procedure 23(a) "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.")).

## **DISCUSSION**

Plaintiff moves to compel further responses to three interrogatories and six document requests.<sup>2</sup> See MTC. Plaintiff's motion presents two issues. First, whether Plaintiff may obtain discovery on all collection vendors utilized by USA Funds or only on those vendors that called Plaintiff. See Oppo. at 6-7; Reply at 2-5. Second, whether USA

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<sup>2</sup> Plaintiff summarizes the requests as seeking the following information: (1) "[i]dentification of the vendors used for collection efforts on USA Funds' behalf"; (2) "[o]utbound dial list and reports of all telephone numbers called using a dialer on USA Funds' behalf"; (3) "[t]elephone number(s) each third-party vendor utilized to contact debtors to collect on USA Funds' behalf"; (4) "[d]ocuments pertaining to USA Funds' affirmative defense of 'prior express consent'"; (5) "[a]greements with the third-party vendors used for collection efforts on USA Funds' behalf and instructions provided to those vendors"; and (6) "[t]elephone dialing equipment utilized to make the phone calls on USA Funds' behalf." MTC at 10.

1 Funds has “possession, custody or control” over the requested documents, or whether  
 2 Plaintiff needs to obtain the records by subpoena from the actual collection vendors. See  
 3 Oppo. at 7-9; Reply at 5-9.

4 **I. Identification of the Vendors Who Did Not Call Plaintiff**

5 In Interrogatory No. 21, Plaintiff asked USA Funds to “IDENTIFY any other vendors  
 6 or third parties, in addition to the previously disclosed collection agencies who may have  
 7 handled the Plaintiff’s loans . . . used during the RELEVANT TIME PERIOD to interact with  
 8 internal phone systems or external telecommunication networks, including but not limited  
 9 to any individual or company that provides outbound dialing services on YOUR behalf (*i.e.*  
 10 third parties who engaged in making collection efforts on YOUR behalf).” Wood Decl.,  
 11 Exh. A at 12. In its response, USA Funds raised a variety of objections and substantively  
 12 responded that it “[wa]s not currently aware of vendors that made collection calls to  
 13 Plaintiff, other than as previously identified.” Id., Exh. C at 5.

14 Plaintiff seeks to compel USA Funds to “[i]dentify all vendors utilized during the  
 15 relevant class period to make collection calls on [] its behalf—not just those vendors that  
 16 collected on Plaintiff’s account.” MTC at 10 (emphasis in original). USA Funds argues that  
 17 information regarding collection vendors who did not call Plaintiff is irrelevant to the current  
 18 dispute because Plaintiff cannot serve as a class representative for individuals who received  
 19 calls from vendors that did not call Plaintiff. Oppo. at 6-7. Plaintiff disagrees and argues  
 20 that she can represent a class of individuals who received improper calls from any vendor  
 21 utilized by USA Funds, not just the specific vendors that called Plaintiff.<sup>3</sup> Reply at 3-4.  
 22 Plaintiff explains that she needs the identities of all of the collection vendors utilized by USA  
 23 Funds during the class period so that she can establish the requirements of Federal Rule  
 24 of Civil Procedure (“FRCP”) 23. See id. at 4-5.

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25  
 26 <sup>3</sup> Plaintiff relies on In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991,  
 27 Request of ACA Int’l for Clarification and Declaratory Ruling, 23 FCC Rcd. 559 ¶¶ 9, 10 (Jan. 4, 2008), which  
 28 provides that “a creditor on whose behalf an autodialed or prerecorded message call is made to a wireless  
 number bears the responsibility for any violation of the Commission’s rules. Calls placed by a third party  
 collector on behalf of that creditor are treated as if the creditor itself placed the call.” Reply at 3-4.

Neither party cited any case law to support its argument regarding the appropriate scope of discovery—whether Plaintiff is entitled to discover the identities of all collection vendors utilized by USA Funds (or by Navient on its behalf) or only of the vendors who actually called Plaintiff. See Mot., Oppo., Reply. In a recent case from the Northern District of California, a district judge opined in a similar TCPA case that a plaintiff in a putative class action had statutory standing as to a defendant’s third-party debt collector that did not call the plaintiff. Lofton v. Verizon Wireless (VAW) LLC, 2015 WL 1254681, at \*4-5 (N.D. Cal. Mar. 18, 2015). The court also stated that “a defendant may be held vicariously liable for calls it does not directly initiate ‘under federal common law principles of agency.’” Id. at 3 (quoting In re Joint Petition Filed by Dish Network, LLC, 28 FCC Rcd. 6574, 6584 (2013) and Thomas v. Taco Bell Corp., 582 Fed. App’x. 678, 679 (9th Cir. 2014)). In reaching this decision, the court reasoned that an individual could represent a class called by different third-party debt collectors if there is “substantial similarity between the conduct of each third-party debt collector at issue,” but acknowledged that every case must be “evaluated independently and the relevant circumstances carefully scrutinized.” Lofton, 2015 WL 1254681, at \*4-5. Other district courts have reached similar conclusions, finding that discovery properly includes entities other than the specific entity that made the allegedly improper call or communication to the named plaintiff. See Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc., 36 F. Supp. 3d 417, 419, 421-22 (S.D.N.Y. 2014) (permitting the plaintiff to obtain discovery regarding illegal advertisements “other than the one which it received” because “such discovery would be relevant to Plaintiff’s future motion for class certification”); In re Monitronics Int’l, Inc., Tel. Consumer Prot. Act Litig., 2014 WL 316476, at \*7 (N.D.W. Va. Jan. 28, 2014) (permitting discovery relating to dealers who did not make actionable phone calls because it is relevant to demonstrate whether the defendants or their agents violated the TCPA); Gilman v. ER Solutions, Inc., 2012 U.S. Dist. LEXIS 190602, at \*10 (W.D. Wash. Feb. 3, 2012) (declining to grant the defendant’s motion for a protective order as to the plaintiff’s requests to identify any third parties the defendant retained to acquire debtors telephone numbers because the requests



1 are relevant to the plaintiffs' individual and class TCPA claims and FRCP 23(a)  
2 requirements).

3 This Court finds the Lofton analysis and holding persuasive and applicable to the  
4 instant case. See Lofton, 2015 WL 1254681, at \*3-5. While the Court is not deciding  
5 whether or not Plaintiff is an appropriate class representative nor whether or not there is  
6 a certifiable class, the Court does find that given the broad scope of FRCP 26 discovery and  
7 given that Plaintiff may be able to represent a class including individuals who were called  
8 by third-party collection vendors that did not call Plaintiff, the discovery request seeks  
9 relevant information. The Court therefore **GRANTS** Plaintiff's motion to compel on this  
10 issue. USA Funds shall respond in full to Plaintiff's Interrogatory No. 21 and identify all of  
11 the collection vendors USA Funds utilized to make calls on its behalf to any borrower during  
12 the class period.

## 13 **II. USA Funds' Control Over the Requested Documents and Information**

14 With regard to the remaining discovery requests, USA Funds' primary argument is  
15 that it does not have possession, custody or control of any of the requested documents and  
16 information. See Oppo. at 7-9. USA Funds argues that all of the documents are in the  
17 possession of Navient or the individual collection vendors, not USA Funds, and that Plaintiff  
18 should obtain the documents from those entities. Id. at 8-9. Plaintiff replies that USA  
19 Funds has legal custody or control over the documents and should be required to obtain  
20 the documents from Navient and the other collection vendors. Reply at 6-9. In arguing  
21 this issue, both parties rely on the language of the Guarantee Services Agreement ("GSA"),  
22 which governs the relationship between Navient and USA Funds. See Oppo. at 3-4; Reply  
23 at 6-8. USA Funds relies primarily on Article III subsection A, which states that the parties  
24 are independent entities who do not act as "agents (except as specifically set forth in this  
25 Agreement), employees, partners, joint ventures or associates of one another." Oppo. at  
26 3; ECF No. 97 at 8. Plaintiff responds by citing several provisions of the GSA which give  
27 USA Funds the legal right to obtain a variety of documents, including, according to Plaintiff,  
28 all of the requested discovery. See Reply at 6-8.



1 The Federal Rules of Civil Procedure provide that a party responding to document  
 2 requests must do so based upon all items in "the responding party's possession, custody,  
 3 or control." Fed. R. Civ. P. 34(a)(1). "The fact that documents are in the physical  
 4 possession of a third party custodian does not eliminate the responsibility of a responding  
 5 party to search for and produce those documents when the party has the legal right to  
 6 obtain the documents on demand." MGA Entm't, Inc. v. Nat'l Prod. Ltd., 2012 WL 182158,  
 7 at \*6 (C.D. Cal. Jan. 23, 2012) (citation omitted). If a contract between two separate  
 8 entities expressly gives one entity the right to obtain the records from the other entity upon  
 9 demand, then the first entity has control over documents in the latter entity's possession.  
 10 See In re Citric Acid Litig., 191 F.3d 1090, 1107 (9th Cir. 1999) (when there is a contractual  
 11 relationship between two companies, in order for a party to compel one company to obtain  
 12 information from the other, "the contract governing the [] relationship" has to "expressly  
 13 give [] the right to obtain" the information in question); see also In re NCAA  
 14 Student-Athlete Name & Likeness Litig., 2012 WL 161240, at \*3 (N.D. Cal. Jan. 17, 2012)  
 15 (holding that the NCAA does not have a "legal right" to acquire documents from its member  
 16 institutions because "[n]either the NCAA Constitution nor the Bylaws" grants the NCAA this  
 17 right). A court will "look to that document and its interpretation to resolve the issue of  
 18 control." U.S. v. Int'l Union of Petroleum and Indus. Workers, AFL-CIO, 870 F.2d 1450,  
 19 1452 (9th Cir. 1989); see also Doe v. AT & T W. Disability Benefits Program, 2012 WL  
 20 1669882, at \*3-4 (N.D. Cal. May 14, 2012). "The party seeking production of the  
 21 documents . . . bears the burden of proving that the opposing party has such control." Int'l  
 22 Union, 870 F.2d at 1452.

23 The Court has reviewed the GSA and finds that it gives USA Funds legal custody and  
 24 control over the requested documents. Article III subsection J, entitled "Use and  
 25 Ownership of Information and Documentation," grants USA Funds ownership rights over  
 26 information generated through Navient's loan collection process as follows:

27 All documents, records, data and other materials containing specific Loan  
 28 information that are used or generated by [Navient] solely in providing the  
 Services (the "Loan Specific Information") are and shall remain the property

1 of USA Funds . . . .

2 ECF No. 97 at 14. This provision also requires Navient to “promptly provide all such Loan  
3 Specific Information to USA Funds upon request.” Id. [REDACTED]

4 [REDACTED]  
5 [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]

12 [REDACTED] Further, in Article V subsection B, Navient also agrees to make the following data  
13 available to a variety of entities “acting at USA Funds’ request or with USA Funds’  
14 authorization” or “upon prior written request of USA Funds”:

15 Data includes, but is not limited to, the Loan information collected and stored  
16 by [Navient] pertaining to the student, borrower, co-signors, school and  
17 lender applicable to each such Loan. **Data also includes Subcontracting**  
18 **Agreements with collection vendors** as long as the terms of such  
Subcontracting Agreements do not prohibit such disclosure to a third party  
such as USA Funds. USA Funds may also request to view a copy of other  
Subcontracting Agreements on a contract-by-contract basis.

19 Id. at 21 (emphasis added). [REDACTED]  
20 [REDACTED]

21 [REDACTED] See id. at 8-9. Even Article III  
22 subsection A, entitled “Independent Contractor,” which USA Funds relies upon for its  
23 argument, includes a statement that the two entities are not agents “except as specifically  
24 set forth in this Agreement.” See id. at 8; see also Oppo. at 3-4. Accordingly, the Court  
25 finds that the GSA gives USA Funds legal custody and control over a substantial variety of  
26 documents created and/or maintained by Navient and collection vendors hired by Navient  
27 to collect on USA Funds’ debts. See Doe, 2012 WL 1669882, at \*3-4 (finding that  
28 contractual provisions that grant the defendant “ownership rights over information and

documents" generated by the third party's services, access to the third party's information for "inspection or audits," and requirements for the third party to perform certain duties "for the defendant in case of litigation" demonstrated that the defendant had control over documents in the third party's possession); Rosie D. v. Romney, 256 F. Supp. 2d 115, 119 (D. Mass. 2003) ("[d]efendants have the right to control and obtain the documents that are in the possession of the various non-defendant agencies" when contractual provisions provide the defendant the right to examine and copy information from subcontractors).

In its opposition, USA Funds does not present any argument challenging the specific discovery requests. See Oppo. Rather, USA Funds relies solely on its argument that it does not have possession, custody or control of any of the documents.<sup>4</sup> Id. Since the Court has found that USA Funds does have legal custody and control over the documents and USA Funds does not present any additional argument regarding the specific discovery requests in its opposition to Plaintiff's motion, the Court may grant Plaintiff's motion without any further analysis. See In re Toys R Us Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig., 2010 WL 4942645, at \*3 (C.D. Cal. July 29, 2010) (quoting Cotracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 655, 662 (D. Kan. 1999)) ("When ruling upon a motion to compel, the court generally considers those objections which have been timely asserted and relied upon in response to the motion. It generally deems objections initially raised but not relied upon in response to the motion as abandoned."); Hupp v. San Diego Cnty., 2014 WL 1404510, at \*7 (S.D. Cal. Apr. 10, 2014) (citing Bryant v. Armstrong, 285 F.R.D. 596, 604 (S.D. Cal. 2012)) (addressing only the objections raised in a party's opposition to a motion to compel where the party raised multiple boilerplate

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<sup>4</sup> The only additional argument that USA Funds mentions is "burden," but the argument is made in relation to the burden imposed by the subpoenas, not any burden related to USA Funds' response to Plaintiff's discovery. Oppo. at 9. In any event, USA Funds fails to provide any facts or evidence supporting this argument. The responding party carries the burden to demonstrate that the discovery is unduly burdensome. Pham v. Wal-Mart Stores, Inc., 2011 WL 5508832, at \*3 (D. Nev. Nov. 09, 2011) (citing Residential Constructors, LLC v. Ace Prop. and Cas. Ins. Co., 2006 WL 3149362, at \*9 (D. Nev. Nov. 1, 2006)). In order to satisfy this burden, USA Funds "must provide sufficient detail regarding the time, money and procedures required to produce the requested documents." Pham, 2011 WL 5508832, at \*3. Because USA Funds did not submit any evidence establishing an undue burden, the Court overrules this argument.

1 objections in its initial responses to discovery requests, but did not support or explain the  
 2 objections in its opposition to a motion to compel); Dolquist v. Heartland Presbytery, 221  
 3 F.R.D. 564, 568 n.16 (D. Kan. 2004) (“objections initially raised but not relied upon in  
 4 response to a motion to compel are deemed abandoned”).

5 Nevertheless, the Court has reviewed the types of information requested by Plaintiff  
 6 and finds that the GSA provides USA Funds with the legal authority to obtain the responsive  
 7 documents. Outbound call lists, reports of telephone numbers called on USA Funds’ behalf,  
 8 and telephone numbers used to contact debtors all constitute Loan Specific Information,

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] See ECF No. 97 at 14-15, 17, 21-22. Similarly, agreements with and  
 12 instructions to collection vendors fall within the scope of [REDACTED]

13 [REDACTED]

14 [REDACTED] See id. at 21. Additionally, documents and information on prior  
 15 express consent<sup>5</sup> fall within the scope of Article III subsection J of the GSA. See id. at 14.  
 16 Finally, information on each vendor’s telephone dialing equipment falls within the scope of

17 [REDACTED]

18 [REDACTED] See id. at 8-9.

19 The Court also has reviewed the requests and finds that they are relevant to  
 20 Plaintiff’s claims and class certification issues. For example, Plaintiff’s request for the  
 21 outbound call list is reasonably calculated to identify the recipients and number of calls  
 22 made during the class period, and thus is relevant to establish FRCP 23 requirements of  
 23 numerosity and commonality. See, e.g., Thrasher v. CMRE Fin. Servs., Inc., 2015 WL

24 \_\_\_\_\_  
 25 <sup>5</sup> Plaintiff clarifies in her motion that she only seeks production of prior express consent documents to  
 26 counter USA Funds’ affirmative defense and to take a FRCP 30(b)(6) deposition concerning such evidence. MTC  
 27 at 16. Plaintiff also notes that USA Funds carries the burden to demonstrate prior express consent and that  
 28 any privacy concerns can be addressed by a protective order. Id. 16-18. USA Funds does not specifically  
 object to this request in its response and does not dispute that it carries the burden to show proof of prior  
 express consent, but argues lack of control over the vendors’ business information and that Plaintiff’s requests  
 are burdensome. See Oppo. at 7-9.

1 1138469, at \*2 (S.D. Cal. Mar. 13, 2015) (finding that the defendant's "outbound call list  
 2 is reasonably calculated to identify the number and recipients of calls made during the class  
 3 period" and "relevant to Rule 23 requirements"); Gaines v. Law Office of Patenaude & Felix,  
 4 A.P.C., 2014 WL 3894348, at \*2 (S.D. Cal. June 12, 2014) (citations omitted) (finding that  
 5 "the outbound dial list is relevant to the issues of numerosity and commonality under  
 6 Federal Rule of Civil Procedure 23(a), and is therefore discoverable."). Further, Plaintiff's  
 7 request for the telephone numbers used to contact debtors is reasonably calculated to  
 8 identify each instance of an improper call and directly relates to Plaintiff's individual and  
 9 class TCPA claims. See Brodsky v. Humana, Inc., 2009 WL 1956450, at \*2 (N.D. Ill. July 8,  
 10 2009) (finding telephone records for each telephone line used to send improper facsimile  
 11 transmissions on the defendant's behalf relevant to the plaintiff's individual and class TCPA  
 12 claims).

13 The Court also finds that Plaintiff's request for documents and information on prior  
 14 express consent is relevant because USA Funds raised this defense in its answer and argues  
 15 in its opposition that Plaintiff consented to the calls.<sup>6</sup> See ECF No. 49 at 5, 10-11; Oppo.  
 16 at 2 n.2; Thrasher, 2015 WL 1138469, at \*6 (noting that if defendant "intends to rely on  
 17 its . . . affirmative defense of prior express consent at trial, then it has the burden to prove  
 18 'it had consent to call the phone numbers at issue, either via prior express consent or  
 19 implied consent.'"); Grant v. Capital Mgmt. Serv., L.P., 449 Fed. Appx. 598, 600 n.1 (9th  
 20 Cir. 2001) (stating that express consent is not an element of a TCPA claim but is an  
 21 affirmative defense for which the defendant bears the burden of proof). Plaintiff's request  
 22 for USA Funds' agreements with and instructions to collection vendors also relates to USA  
 23 Funds' affirmative defense of prior express consent and other class certification issues, and  
 24 meets FRCP 26's relevancy requirement. See Cabrera v. Gov't Emples. Ins. Co., 2014 U.S.  
 25 Dist. LEXIS 90810, at \*34 (S.D. Fla. July 3, 2014) (ordering the defendant to produce all  
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27 <sup>6</sup> In its opposition, USA Funds states that "[d]iscovery has revealed that Henderson did provide  
 28 consent to the calls at different points in time. Documentation reflecting this consent has been produced to  
 Henderson. See, e.g., Bates No. NSISAC000183." Oppo. at 2 n.2.

1 manuals or documents containing policies and procedures relating to its vendor making  
2 subrogation calls using an artificial or prerecorded voice in a TCPA case). Finally, the Court  
3 finds that Plaintiff's request for information on each vendor's telephone dialing equipment  
4 is relevant to establish the basis of Plaintiff's individual and class TCPA claims—whether USA  
5 Funds' vendors used automatic telephone dialing system to call her or other putative class  
6 members' cellular telephones. See Thrasher, 2015 WL 1138469, at \*4; 47 U.S.C.  
7 § 227(b)(1)(A) (the TCPA prohibits a person from making any calls "using any automatic  
8 telephone dialing system or an artificial or prerecorded voice"). The Court thus grants  
9 Plaintiff's motion to compel and **ORDERS** USA Funds to produce all non-privileged,  
10 responsive documents requested in RFPs Nos. 67-72 and to respond in full to Plaintiff's  
11 Interrogatories Nos. 22 and 23.

### 12 **CONCLUSION**

13 For the reasons set forth above, the Court finds that Plaintiff may obtain discovery  
14 on all collection vendors USA Funds utilized to make calls on its behalf to any borrower  
15 during the class period, and that USA Funds has legal custody and control over the  
16 requested documents. Accordingly, Plaintiff's motion is **GRANTED** and USA Funds is  
17 ordered to produce the information sought by **August 17, 2015**.

18 **IT IS SO ORDERED.**

19  
20 DATED: July 28, 2015

21 

22 BARBARA L. MAJOR  
23 United States Magistrate Judge  
24  
25  
26  
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